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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION

Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session

Chairman-Rapporteur: Ms. Elizabeth Odio Benito (Costa Rica)

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Introduction

1. The Commission on Human Rights, in its resolution 1999/30, took note of the report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/1999/59 and Add.1) and requested the working group, in order to continue its work, to meet prior to the fifty-sixth session of the Commission for a period of two weeks, with a view to completing expeditiously a final and substantive text, and to report to the Commission at its fifty-sixth session.

2. The Economic and Social Council, in its decision 1999/237, authorized an open-ended working group of the Commission to meet for a period of two weeks prior to its fifty-sixth session.

I. ORGANIZATON OF THE SESSION

A. Opening of the session and election of officers

3. The working group held its eighth session from 4 to 15 October 1999. It was opened by the United Nations High Commissioner for Human Rights, Ms. Mary Robinson, who made an introductory statement.

4. At its first meeting, on 4 October 1999, the working group elected Ms. Elizabeth Odio Benito (Costa Rica) as Chairman-Rapporteur.

B. Attendance

5. Representatives of the following States members of the Commission on Human Rights attended the meetings of the working group, which were open to all members of the Commission: Argentina, Austria, Canada, China, Colombia, Cuba, Ecuador, El Salvador, France, Germany, Guatemala, Ireland, Italy, Japan, Mexico, Morocco, Norway, Poland, Republic of Korea, Russian Federation, South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.

6. The following States non-members of the Commission on Human Rights were represented by observers at the meetings of the working group: Algeria, Australia, Bahrain, Belgium, Brazil, Bulgaria, Costa Rica, Croatia, Denmark, Egypt, Estonia, Finland, Georgia, Hungary, Iran (Islamic Republic of), Lithuania, Netherlands, Slovakia, Spain, Sweden, Saudi Arabia, Syrian Arab Republic, Turkey and Ukraine.

7. The Holy See and Switzerland were also represented by observers.

8. The International Committee of the Red Cross and the following non-governmental organizations were represented by observers at the meetings of the working group: Amnesty International, Association for the Prevention of Torture, International Federation of ACAT (Action of Christians for the Abolition of Torture) and Human Rights Watch.

9 The Committee against Torture was represented by an observer

C Documentation

10 The working group had before it the following texts and documents

E/CN 4/1999/WG 11/1	Provisional agenda
E/CN 4/1999/59 and Add 1	Report of the working group on its seventh session
E/CN 4/1999/WG 11/WP 1	Working paper submitted by the secretariat
E/CN 4/1998/42 and Corr 1	Report of the working group on its sixth session
E/CN 4/1997/33	Report of the working group on its fifth session
E/CN 4/1996/28 and Corr 1	Report of the working group on its fourth session
E/CN 4/1991/66	Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights

D Organization of work

11 At its first meeting, on 4 October 1999, the working group adopted its agenda as contained in document E/CN 4/1999/WG 11/1

12 At the same meeting, the working group agreed with the proposal of the Chairman-Rapporteur to hold, during the first week of its session, a general discussion on the following issues

(a) Prevention mechanism the protocol as a preventive and not a punitive instrument,

(b) Dialogue and cooperation between the Subcommittee and States parties as the main principles of the protocol,

(c) Different aspects of cooperation

(i) Confidentiality and standing invitations to the Subcommittee,

(ii) Cooperation of States parties with the Subcommittee in the course of missions and visits,

(iii) Cooperation between the Subcommittee and States parties to implement recommendations of the Subcommittee,

(d) Framework of cooperation

(i) Different missions,

(ii) Modalities,

(iii) Places to visit,

(iv) Organization and conduct of missions,

(v) Follow-up (reports and recommendations),

(vi) Follow-up visits,

(e) Proposals for future work.

13. The working group also considered it appropriate that this general discussion be linked to texts of articles of the draft optional protocol proposed at previous sessions.

14. At the eighth meeting, on 7 October 1999, the working group decided, with regard to organizing its work on the consideration and drafting of various articles of the optional protocol during the second week of the session, to alternate, as needed, informal discussions with plenary meetings. Subsequently, a small drafting group was set up to speed up the drafting process (see also paragraph 50 below).

15. At its seventh meeting on 7 October 1999, at the request of the working group, the observer for the Association for the Prevention of Torture informed the participants about the contents and results of the discussion at the workshop entitled "Visits under international law: verification, monitoring and prevention". The workshop had been organized by the Association for the Prevention of Torture in cooperation with the Verification Research, Training and Information Centre (VERTIC), the International Commission of Jurists, the Quakers United Nations Office and the Foundation for International Environmental Law (FIELD) and held at Geneva on 23 and 24 September 1999. The objective of the workshop was to explore and discuss the subject of visits and missions as emerging standards of preventive, monitoring and verification procedures in international law, including human rights law. It provided a broad overview of the subject and explored similarities and differences between the experiences from different fields of international law (environmental law, human rights, humanitarian law and disarmament).

16. At the ninth meeting, on 12 October 1999, the observer for the Committee against Torture addressed the working group. He made comments on some of the new proposals relating to draft article 1 which the working group had before it and answered the questions put by participants regarding various aspects of the work of the Committee against Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

II GENERAL DISCUSSION

A Prevention mechanism

17. At the first and second plenary meetings, on 4 October 1999, the working group discussed the issue of the optional protocol as an instrument of prevention. The discussion was held with reference to the preamble, article 3 (confidentiality) and article 18 (reservations) of the draft optional protocol (see E/CN.4/1997/33, annex I, E/CN.4/1996/28, annex I).

18. It was generally felt that the optional protocol would have a preventive rather than punitive character since its goal was not to sanction but to create an effective system of preventive visits in order to help States parties to improve the protection of persons deprived of their liberty. Prevention, cooperation and confidentiality were referred to as fundamental principles to achieve the main goals of the optional protocol.

19. With regard to confidentiality, several delegations considered this element to be a modus operandi, a methodology to be used in the implementation of the optional protocol. They felt that observing confidentiality was not an end in itself but a tool to facilitate confidence and to ensure that States would cooperate. Confidentiality was therefore important but not a core issue. According to another view shared by several delegations, confidentiality was one of the important principles on which the optional protocol was based and which could promote its acceptability by States. Reference was made in this connection to article 3 (3) stating that the principle of confidentiality was one of the guiding principles for the Subcommittee. The Chairman-Rapporteur subsequently proposed to consider confidentiality as a principle having a complementary, facilitating function, she also proposed that a reference to confidentiality, as well as to the principle of cooperation, be included in the preambular part of the optional protocol.

20. On the issue of reservations, several delegations felt that the text of the draft optional protocol should include the possibility of making reservations. It was argued that in accordance with the Vienna Convention on the Law of Treaties, any legal instrument could allow reservations. Since the optional protocol contained not only procedural but also substantive provisions imposing obligations on States parties, they should be entitled to make reservations. A reference was made to the Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict which was adopted in March 1999 and which does allow reservations. It was also pointed out that the possibility of making reservations would guarantee wider acceptance of the optional protocol. Alternatively it was proposed that those articles or concepts on which reservations would not be allowed be mentioned in the text of the optional protocol.

21. Another view, shared by several speakers, held that reservations could undermine the whole purpose of the optional protocol and the impartial functioning of its monitoring mechanism. It was crucial that no reservations to the optional protocol be allowed. It was also pointed out that draft article 13 already contained a "negotiated reservation" and that other(s) could be discussed if necessary. A reference was made to the Statute of the International

Criminal Court which does not allow any reservations. Some delegations considered that since the optional protocol was to be mainly institutional and procedural, it would be illogical to permit reservations to it.

22. The Chairman-Reporter concluded that in the absence of consensus, further discussion was needed on the issue of reservations.

23. As part of the effort to prevent torture, it was important to provide technical assistance to developing countries in the training of relevant personnel at places of detention. It was proposed to include a reference to such international assistance and cooperation in article 17 relating to the establishment of a special fund for such a purpose (see E/CN.4/1999/59, annex I). In this regard, it was also proposed to use as a model the wording of article 2 of the International Covenant on Economic, Social and Cultural Rights.

B. Dialogue and cooperation between the Subcommittee and States parties

24. At the third plenary meeting, on 5 October 1999, the working group held a discussion on the issue of dialogue and cooperation between the Subcommittee and States parties as the main principles of the optional protocol. Articles 1 (purpose and scope of the protocol) and 8 (types of missions and their notification) were considered to be of direct relevance to this discussion (see E/CN.4/1998/42, annex II).

25. There was general support for the statement that dialogue and cooperation were essential to ensuring the effectiveness of the optional protocol. It was emphasized that international cooperation and technical assistance were needed in order to improve conditions in prisons and other places of detention, in particular in developing countries; this was to be financed by the special fund envisaged in article 17, referred to in paragraph 23 above. It was felt appropriate to include in the text of the optional protocol the idea of a State-to-State dimension of such international cooperation.

26. With regard to draft article 1 and related issues, the following main questions were raised.

27. The view was expressed that the wording of article 1 (1) permitting visits to any place in any territory under a State party's jurisdiction might lead to a conflict of law or have a potential impact on non-State parties, particularly in cases when access would be sought to diplomatic missions or foreign military installations. In this connection, it was pointed out that article 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment also refers to any place within a State party's jurisdiction and that no exceptions were made to this provision nor had any problems been encountered in its implementation.

28. According to another opinion, visits "to any place" could not in practice be permitted because they might infringe some existing domestic regulations, or might conflict with national

security concerns in general. In this regard, it was argued that if national security concerns were to be invoked, this should be done in the context of visits by the Subcommittee rather than in the context of article 1.

29. It was also felt by some delegations that the meaning of the phrase "at its instigation or with its consent or acquiescence" in article 1 (1) was not clear enough since it could have a bearing on the categories of places to be open to visits. It was also suggested that this wording should be deleted because it provided wide scope for controversy in its interpretation. Others pointed out that this was the wording used in article 1 of the Convention against Torture.

30. Several delegations found that the notion of places where the persons deprived of their liberty "may be held" as stated in article 1 (1) was too broad and imprecise. Other speakers supported this wording and argued that in order to prevent torture, visits to all de facto places of detention should be allowed. Other delegations noted that the words were derived from article 1 of the Convention against Torture and argued that the optional protocol should not have a narrower scope than the Convention. An analysis was also offered that the notion of "may be held" would cover not only de facto places of detention but also places intended to serve as places of detention, such as prisons under construction.

31. With regard to the places that could be visited by the Subcommittee, a question was raised as to whether this referred only to those affiliated with the Government or also to those that were privately owned. The view was expressed that the links to acts or orders of public authorities should in all cases be clearly established.

32. With regard to the formula "in accordance with applicable international law and relevant international standards", as contained in article 1 (2), it was suggested that specific references should be added in the text to make national obligations more clear. A view was also expressed that the notion of "international standards" was undefined and problematic in application and should therefore be deleted. Another proposal was to replace this wording with "applicable international instruments and international law". Other delegations found the formula used in article 1 (2) sufficiently clear and therefore fully acceptable. In their view, relevant international standards included both binding (universal and regional) instruments as well as pertinent recommendatory documents ("soft law").

33. On the issue of periodic and other missions as envisaged in article 8 (1), some delegations expressed concern with regard to a lack of precision as to the grounds on which such ad hoc visits could take place. It was also pointed out that the obligation of States to accept visits which were "triggered" by allegations of torture had to be in line with their constitutional provisions protecting privacy and private property.

34. The scope of application suggested in draft articles 1 and 8 was found by some speakers to be wider than the corresponding standards of the European Convention for the Prevention of Torture. The view was expressed that the optional protocol could not go beyond the standards of the European Convention. It was also pointed out that in some developing countries resources might not be available to implement higher standards. Other speakers disagreed and insisted that it should be possible to establish new and improved standards in a new legal document.

C. Different aspects of cooperating and framework of cooperation

35. At the 4th, 5th and 6th meetings, on 5 and 6 October 1999, the working group discussed different aspects and the framework of cooperation with reference to articles 1 and 8 (see above), 12 (modalities of conducting a mission and visits - see E/CN.4/1996/28, annex I), 13 (exceptional circumstances in which a visit could be postponed - see E/CN.4/1999/59), annex II) and 14 (reporting and publicity - see E/CN.4/1996/28, annex I).

36. In this connection, the following main issues were discussed:

(a) Whether the ratification of the protocol by a State party implied that a standing invitation was extended to the Subcommittee or whether the Subcommittee should receive prior consent from the State party before each mission (arts. 1 and 8);

(b) Cooperation between the Subcommittee and the State party during a mission (art. 12);

(c) Exceptional circumstances in which a visit could be postponed (art. 13);

(d) Reporting and publicity (art. 14).

37. No agreement was reached in the working group on the first issue. The view was expressed that the principle of a standing invitation was necessary for the efficacy of the optional protocol. If the Subcommittee were to be obligated to enter into long negotiations with States parties prior to missions, it would have negative implications on the efficiency and the continuity of the Subcommittee's activities. It was emphasized that in the absence of a standing invitation, the optional protocol would bring no or limited added value to the Convention since article 20 of the Convention already allows the Committee against Torture to undertake confidential missions with the prior consent of the State party. Further, in view of earlier discussions on the subject, several delegations added that the principle of a standing invitation was in full conformity with the principle of national sovereignty, since the ratification of the protocol was optional and since the decision to ratify was itself an act of national sovereignty. It was also pointed out that standing invitations were a sign of continuity and long-term cooperation and favoured constructive dialogue with States.

38. Other delegations expressed the opinion that in view of the broad scope of draft article 1 in terms of the places and territories the Subcommittee was to be allowed to visit, a standing invitation would basically enable the Subcommittee to go anywhere at any time. Such far-reaching competence would be an infringement on the sovereignty of States and thus unacceptable. The concern was also expressed that including a standing invitation in the optional protocol would result in it being ratified by very few States.

39. Several speakers mentioned the possibility of having different standards relating to different types of missions, i.e. standing invitations for regular missions and another standard if the mission was occasioned by special circumstances and/or allegations of torture.

40. On the second issue, the working group concentrated on the scope of the cooperation envisaged between the States parties and the Subcommittee. Some delegations pointed out that their constitutional requirements and/or their national legislation, in particular on the right to privacy and private property, safety requirements, witness protection, etc., could prevent them from giving the Subcommittee free access to all types of information or places. Restrictions in national legislation could also limit the possibility of the Subcommittee to require testimony from detained persons or to interview prisoners "without witnesses".

41. It was emphasized by some delegations that it was a prerequisite to establish a framework for the normal work of the Subcommittee, including such elements as freedom of movement and access to all relevant information, places and persons.

42. On the third issue, it was strongly felt that representations against visits should be strictly limited, and only made for urgent and compelling reasons, which should be narrowly defined in the text; the general rule should be unhindered access for the Subcommittee. It was also suggested that any such representations should lead only to the postponement of a visit, not its cancellation.

43. Additional grounds for postponing a visit were proposed by some speakers, including the urgent interrogation of persons to be visited and the health problems of such persons. It was pointed out, with regard to the former, that under article 9 of the European Convention for the Prevention of Torture, urgent interrogation could only be an acceptable excuse when it was actually in progress, but not in relation to the whole process of criminal investigation. Doubts were also expressed concerning the acceptability of health problems as a valid ground for refusing access to the person in question. It was pointed out in this regard that as a result of torture or other cruel treatment or punishment, such persons were normally in very bad physical condition.

44. On the fourth issue, relating to the nature and implementation of recommendations, there was a general discussion on whether article 14 should basically be of a technical nature. It was proposed that two types of recommendations could normally be addressed to States parties by the Subcommittee: (a) those for more or less speedy implementation by the States parties themselves, and (b) those which were supposed to be progressively implemented by the States parties through technical assistance and cooperation financed by the special fund to be set up pursuant to article 17. The improvement of national legislation or the reform of penitentiary systems were mentioned as examples of the second type of recommendation. It was felt that the concept of technical assistance and cooperation should be duly highlighted in article 14.

45. According to another opinion, shared by some delegations, the missions of the Subcommittee should be of short duration (a few days only), the Subcommittee should comply with the principle of non-interference with the domestic affairs of States and its recommendations should be technical, realistic (feasible) and objective. Thus, recommendations should not relate to such issues as the penalty to be imposed or to substantive matters of national legislation which are exclusively within the sovereign competence of States. It was emphasized that in no case should the Subcommittee be acting as a supranational body.

46. On the question of public statements by the Subcommittee or the publication of its reports, it was widely felt that such "going public" would be an exceptional measure, the reports would normally be confidential unless the State concerned manifestly refused to cooperate.

47. While a public statement by the Subcommittee as a last resort in cases of a failure or refusal to cooperate was acceptable to many speakers, a view was expressed that this provision of draft article 14 still needed precision and that major amendments had to be made. Particular emphasis was placed on the need to arrive at a definition of the concept of the "failure to cooperate" or to identify the specific circumstances of non-cooperation and to determine who was to decide whether a State had been cooperative or not, and how this determination was to be made.

48. The view was expressed that the public statement and the publication of a report should not be seen as a punishment. In this regard, it was felt that according to the draft provision concerned, it was up to the Subcommittee to judge whether a State was cooperative or not and consequently to decide whether to publicize or not. It was argued that the Subcommittee would therefore become a de facto arbitrator and that this was incompatible with the nature of the Subcommittee and the optional protocol.

49. With reference to the question of publishing the reports of the Subcommittee, several delegations considered of particular importance the provision of article 14 (5) stating that no personal data should be published without the express consent of the person concerned.

50. Other issues raised in connection with article 14 included the contents of the reports of the Subcommittee, the feasibility of implementing its recommendations, the relationship between the Subcommittee and the Committee against Torture, the time-frame for the (progressive) implementation of the recommendations of the Subcommittee, and the question of how the special fund to be established under article 17 would be informed of the Subcommittee's recommendations.

D. Proposals for future work

51. At the seventh and eighth meetings, on 7 October 1999, the working group discussed the organization of its work during the second week of the session. It was decided to set up three "baskets" of issues on which drafting would continue on the basis of the texts proposed during previous sessions and any new proposals received. The first basket contained the preambular part and articles 1, 8, 12 and 13. The second basket contained article 18, and the third basket was composed of articles 14, 16 and 17. Delegations wishing to present new or modified texts were requested to submit them in writing before the established deadline.

52. The written contributions received from the delegations of Australia, Canada, Egypt (also on behalf of Algeria, China, Cuba, Saudi Arabia, the Sudan and the Syrian Arab Republic) and Japan were before the working group on 11 October 1999 when it met in informal session and began its consideration and drafting of articles relating to the first basket of issues. A small drafting group consisting of authors or coordinators of written contributions as well as other interested delegations was established to speed up the drafting process.

53. In the course of informal meetings held on 12, 13 and 14 October 1999, the working group discussed the preliminary texts of the preamble and some of the articles relating to the first basket of issues which were prepared by the drafting group.

III. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES OF THE DRAFT OPTIONAL PROTOCOL

A. Preamble and articles 1, 8, 12 and 13

54. At the tenth plenary meeting, on 14 October 1999, the working group had before it the consolidated texts of various proposals relating to the preamble and articles, 8, 12 and 13 as submitted by the informal drafting group (see annex II).

55. In introducing the proposals on behalf of the drafting group, the observer for Australia explained that disagreements which could not be resolved in the group were reflected in square brackets in the text. He pointed out that some delegations took the view that articles 8, 12 and 13 should only refer to visits and that a distinction between missions and visits should not be maintained in the text. Other delegations noted that the working group had already adopted a number of articles (e.g. art. 11) which reflected a distinction between missions and visits, a concept found in the first draft of the optional protocol (E/CN.4/1991/66). No agreement could therefore be reached on this issue, and the words "missions" and "visits" appeared as alternatives within brackets in draft articles 8, 12 and 13. The observer for Australia felt that this problem might be solved once the concerned delegations had had the time to review the implications of the distinction.

56. With regard to article 13, the observer for Australia indicated that many delegations agreed that this article should apply only to particular visits in the context of a mission to a country. The text reproduced in paragraph 66 of the report of the working group on its last session (E/CN.4/1999/59) was referred to in this regard. Other delegations argued that article 13 should apply to a mission to a country and not just to a visit which comprised part of a mission to a particular country, i.e. a decision whether to go to a country at all. Views were divided as to whether the grounds for postponing a visit contained in article 13 (1) should be limited to the grounds found in the European Convention for the Prevention of Torture. Some delegations argued that "the medical condition of a person" should not be included as a ground for postponement. In article 13 (2), a reference to transferring a person to be visited to another place was considered to be redundant given the reference to "arrangements to enable the Committee to exercise its functions" and therefore was deleted.

57. With regard to article 8, the observer for Australia explained that the draft text included in brackets the proposal of one group of countries for the optional protocol to provide only for

regular and not follow-up or ad hoc visits. In paragraph 1 (b), the term "reliable information" had been incorporated so as to be consistent with the language used in the Convention against Torture and the Convention on the Elimination of All Forms of Discrimination against Women. Some delegations argued that the Subcommittee, in making a notification under paragraph 2 (a), should be required to include a definitive list of places to be visited. Other delegations argued that this was too restrictive and that it might be appropriate for the Subcommittee, e.g. in relation to a regular mission, first to send a notification which would propose timing, with more details to be worked out during the period of consultation leading up to the mission. It was also explained that the words ["six months"] in paragraph 3 (a) reflected the view of some delegations that (i) a maximum time-limit should be imposed for the carrying out of a visit/mission beginning at the time of the notification so that a notification was not left without being acted upon, and (ii) a minimum period of prior notification should be required before any mission/visit took place. Many other delegations held the view that the protocol should not prescribe in detail the operating rules of the Subcommittee. The observer for Australia also pointed out that there was no agreement on the prior consent requirement contained in bracketed paragraph 2 (b).

58. In connection with article 12, it was explained that the first paragraph reflected closely the language found in draft article 12 as reproduced in paragraph 20 of the report of the working group on its last session (E/CN.4/1999/59). The drafting group ran out of time before it could fully consider the issue of whether an article X on national legislation should be included in the protocol and, if included, what content it should have. Some delegations insisted that if an article X on national legislation were included in the protocol, they might be able to accept article 12 (1) as drafted. Other delegations indicated that they opposed a separate article X on national legislation and, depending on the final form of paragraph 2 of article 12, they might be able to accept paragraph 1 as drafted. A number of other delegations stated that they could not accept at all a separate article X on national legislation as it would undermine the objectives of the protocol. All delegations agreed that paragraph 2 of article 12 required further development. In light of these divergent views the whole of article 12 was put in square brackets. In addition, the whole text of article X was also put in brackets.

59. With regard to the preamble, the observer for Australia noted that views were divided on whether to include the term "detained" or "deprived of their liberty". Many delegations pointed out that the term "deprived of their liberty" was more commonly used in the human rights arena and that the term "detained" could be too narrow. He also pointed out that there was no agreement on whether to include paragraph 3 of article 1. A number of delegations felt that the issues covered in that paragraph would be more appropriately addressed in article 13. Many delegations also expressed the view that the language of paragraph 3, if accepted, would provide for an excessively wide exclusion to the scope of the protocol.

60. The representative of Cuba suggested, with regard to article 8 (1) (b), that the concept of "reliable information" should be given further consideration to make it clearer by establishing precise criteria.

61. Following the proposal by the Chairman-Rapporteur, the working group agreed to include the text of the preamble and articles 1, 8, 12 and 13 as submitted to the plenary by the drafting group in annex II to the report of the working group to serve as a basis for future discussion.

B. Particular views expressed by some delegations

62. At the same meeting, several delegations expressed their particular views on the first basket of articles and related issues. These are given below.

63. The representative of Cuba, speaking also on behalf of the delegations of Algeria, China, Egypt, Saudi Arabia, the Sudan and the Syrian Arab Republic, made a joint statement on their position paper submitted to the Chair regarding the preamble and articles 1, 8, 12, 13 and X. They stated that starting from the preamble the content of the draft protocol should reflect clearly its cooperative, preventive, confidential, non-duplicative and advisory nature. It was also stated that it was possible to balance the sovereignty and legitimate concerns of States and the effectiveness of the protocol through the prior consent of the State to a visit. In this connection, the words "may" and "any place", as well as "deprived of their liberty", were too wide, controversial and undefined, and raised many problems relating to national security and domestic affairs.

64. Regarding the visits, the above delegations emphasized that while defining the word "visits", the protocol should be based on non-discriminatory regular visits to all States parties, avoiding any possibility of selectivity. They also pointed out that paragraph 1 of article 12 might be acceptable on the understanding that there would be an article X on national legislation. They underlined that the objections mentioned in article 13 were to be decided by the State party and should apply to a particular part of a visit but also, as appropriate, to a whole visit.

65. The representative of China, referring to the question of "visits" and "missions", stated that since the drafting process had been conducted in English only, the interpretation of those terms in other languages might appear to be quite different. Therefore, he felt it advisable to use one term only to avoid possible controversies in the future. He also reaffirmed the importance which his delegation attached to the provision that all missions or visits should be conducted only with the prior consent of the State concerned.

66. The representative of China also reiterated the importance of referring to national legislation in the optional protocol and recalled the understanding reached on this issue last year according to which article 12 had a close relationship with article X dealing with national legislation.

67. The observer for Denmark stated that her delegation would continue to show flexibility in the negotiations with a view to creating an effective mechanism of preventive visits providing the Subcommittee with a reasonable framework for its work. Her delegation hoped that the principle of cooperation would prevail and that the negotiations would continue in that spirit.

68. The observer for Switzerland said that his delegation had taken note of the remarks made by the representative of Cuba on behalf of a number of delegations. Although his Government did not share the concerns expressed, it would continue to negotiate in good faith, constructively and in a spirit of compromise so that an effective protocol could be adopted as soon as possible.

69. The observer for Australia, supported by several other delegations, suggested that a link be made between draft article 8 (3) and the arrangements referred to in article 12 (2).

70. The representative of the United States of America stated that his delegation would be hesitant to agree to such a link since that would imply that any arrangements mentioned in article 12 (2) should be worked out in advance of a visit. That, however, could be problematic since the circumstances on the ground could change.

71. The representative of Poland stated that although not much progress had been made during the current session of the working group, some small steps had been taken and the group should continue to move forward.

72. The observer for Costa Rica referred to the original text of the draft optional protocol as submitted by her Government in 1991 and expressed the hope that an effective system of preventive visits to places of detention would soon be established in order to strengthen the protection of persons deprived of their liberty.

73. The observer for the Association for the Prevention of Torture referred to the clear distinctions between "missions" and "visits" which had already been clearly settled at the previous sessions of the working group and reflected throughout the text of the optional protocol. The observer also pointed out that the optional protocol had always been intended to apply to "persons deprived of liberty", as opposed to the narrower concept of "detained persons". She expressed the concerns of her organization with regard to the attempts to reopen the debate on agreed language on these issues. She stated that the Subcommittee should be able to apply modalities in the conduct of a mission to everybody in order to promote its impartial and non-selective functioning and to ensure the universality of the protocol. She also reiterated that there had been no consensus in the working group with regard to the inclusion of a separate provision (article X) on national legislation in the optional protocol since it was not needed in an international instrument and could only limit the scope of its application.

IV. FUTURE WORK

74. At its eleventh plenary meeting, on 15 October 1999, the representative of Guatemala proposed, on behalf of the Latin American group, to recommend to the Commission on Human Rights that the Chairman-Rapporteur of the working group should again be requested to continue her informal consultations in the period between the sessions of the working group on any remaining outstanding issues. The proposal was also supported by the delegations of Switzerland, Denmark, Georgia, Finland (on behalf of the European Union), Sweden, Canada, Australia, the United Kingdom of Great Britain and Northern Ireland and Turkey.

75. The representative of Cuba pointed out in this regard that when organizing her informal consultations, the Chairman-Rapporteur should bear in mind the heavy workload of various delegations.

76. The observer for Georgia proposed to recommend to the Commission on Human Rights to authorize the working group to hold an additional session of several days to speed up the drafting process. The representative of Cuba stated that his delegation did not agree to additional time for the working group which should remain within the time normally allocated to other important working groups which perform similar tasks.

V. ADOPTION OF THE REPORT

77. The report of the working group was adopted ad referendum at the eleventh plenary meeting, on 15 October 1999. The details of the adoption will be included, if necessary, in an addendum to the present report.

Annex I

TEXT OF THE ARTICLES WHICH CONSTITUTE THE OUTCOME OF THE SECOND READING AT THE FIFTH, SIXTH AND SEVENTH SESSIONS*

Article 2

There shall be established a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

1 In the application of this Protocol the Subcommittee and the State Party concerned shall cooperate with each other.

2 The Subcommittee shall conduct its work within the framework of the Charter of the United Nations and be guided by the purposes and principles therein.

3 The Subcommittee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

Article 4

1 The Subcommittee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.

2 The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3 No two members of the Subcommittee may be nationals of the same State.

4 The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

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* As contained in document E/CN.4/1999/59, annex I. The number in brackets refers to the number of the article in the first-reading text (E/CN.4/1996/28, annex I).

Article 5

1 Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 4, and in doing so shall provide detailed information on the qualifications of the nominees.

2 (a) Nominees of the Subcommittee shall have the nationality of a State Party to the present Protocol.

(b) At least one of the two candidates shall have the nationality of the nominating State Party.

(c) Not more than two nationals of a State Party shall be nominated.

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the written consent of that State Party.

3 At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them.

Article 6

The members of the Subcommittee shall be elected in the following manner:

1 Elections of the members of the Subcommittee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2 The initial election shall be held no later than six months after the date of entry into force of the present Protocol.

3 The States Parties shall elect the members of the Subcommittee by secret ballot.

4 In the election of the members of the Subcommittee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5 Consideration shall also be given to balanced representation of women and men on the basis of the principles of equality and non-discrimination.

6. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee, the membership of the Subcommittee shall be resolved in the following manner in conformity with article 4, paragraph 3:

(a) The candidate receiving the higher number of votes shall serve as the member of the Subcommittee;

(b) Where the nationals have received the same number of votes, the following procedure applies:

(i) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee;

(ii) Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;

(iii) Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

Article 7

If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 4, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9 [6]

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 6, paragraph 1.

Article 10 [7]

1. The Subcommittee shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one members shall constitute a quorum;

(b) Decisions of the Subcommittee shall be made by a majority vote of the members present;

(c) The Subcommittee shall meet in camera.

3 The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure.

Article 11 [9]

1 The Subcommittee may decide to postpone a mission to a State Party if the State Party concerned has agreed to a scheduled visit to its territory by the Committee against Torture, pursuant to article 20, paragraph 3 of the Convention. The dates of the rescheduled mission shall be determined taking into account the provisions of articles 1 and 8.

2 The Subcommittee, while respecting the principles set out in article 3, is encouraged to cooperate for the prevention of torture in general with the relevant United Nations organs and mechanisms as well as international, regional and national institutions or organizations working towards strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.

3 If, on the basis of a regional convention, a system of visits to places of detention similar to the one under the present Protocol is in force for a State Party, the Subcommittee shall still be responsible for missions to such a State Party under this Protocol, assuring its universal application. However, the Subcommittee and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to the efficient promotion of the objectives of this Protocol, including on the matter of duplication of work.

Such cooperation may not exempt the States Parties belonging also to such conventions from cooperating fully with the Subcommittee.

4 The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1997, or the possibility for any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 13 [consolidated 10 and 11]

1 Missions should be carried out by at least two members of the Subcommittee, assisted by interpreters if necessary. If needed, the Subcommittee may be assisted by experts.

2 The Subcommittee shall upon deciding the composition of the mission take into account the particular objectives of the mission.

3. (a) The Subcommittee shall consult confidentially the State Party concerned, in particular regarding the composition and size of the mission other than with regard to the participating members of the Subcommittee.

(b) The State Party concerned may oppose the inclusion of an expert or interpreter in the mission to the territory under its jurisdiction, whereupon the Subcommittee shall propose alternatives.

4. No member of the delegation, with the exception of interpreters, may be a national of the State to be visited. The conduct of the delegation and of all of its members shall be bound by the criteria of independence, impartiality, objectivity and confidentiality.

5. Experts shall be subordinate to and assist the Subcommittee. With regard to a mission, they shall in all respects act on the instruction of and under the authority of the Subcommittee. They shall in no case undertake any missions by themselves under the present Protocol.

Article 14

1. In order to establish a list of experts available for the Subcommittee, each State Party may propose no more than five national experts, qualified in the areas covered by the present Protocol, giving due consideration to gender balance.

2. As needed, the United Nations and specialized agencies may also propose experts to be included on that list.

3. The Subcommittee will annually notify the States Parties of the comprehensive list of experts.

4. In special cases, where specific knowledge or experience is required for a particular mission, and such knowledge or experience is not available on the list of experts, the Subcommittee may include in a mission an expert who is not on the list.

5. In selecting experts for a mission, the Subcommittee shall give primary consideration to the professional knowledge and skills required, taking into account regional and gender balance.

Article 15 [12 bis]

Each State Party shall disseminate information about the present Protocol, the tasks of the Subcommittee and the facilities to be provided to the Subcommittee during a mission to all concerned authorities and ensure the inclusion of such information in the training of relevant personnel, civil, police and military, who are involved in the custody, interrogation or treatment of persons in situations referred to in article 1.

Article 16 [16]

1. The expenditure incurred by the implementation of the present Protocol, incuding missions, shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.

Article 17 [16 bis]

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations as well as other private or public entities.

Article 18 [17]

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 19 [18]

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 20 [18 bis]

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 21 [19]

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Subcommittee has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of the State Party becomes effective, the Subcommittee shall not commence consideration of any new matter regarding that State.

Article 22 [19 bis]

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 23 [20]

Members of the Subcommittee and of missions authorized under the present Protocol shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 24

In the conduct of missions, all members shall without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State, and

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 25 [21]

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

Annex II

TEXT OF THE ARTICLES WHICH CONSTITUTE THE BASIS FOR FUTURE WORK

Preamble

The States Parties to the present Protocol,

Considering that in order to further achieve the purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as the Convention) it is appropriate to strengthen the protection of [persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment] [the detained persons],

Considering that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

Bearing in mind also the principles of cooperation and confidentiality as basic principles of the present Protocol,

[Affirming that non-judicial, non-selective, non-duplicative and technical consultative visits can lead to the realization of the provisions of the present Protocol, and complement the functions of the Convention against Torture and other human rights mechanisms related to torture,]

Have agreed as follows

Article 1

1 The objective of this Protocol is to establish a preventive visiting mechanism to examine the treatment of persons [deprived of their liberty] [detained] with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment [as defined under international law applicable to the State Party] [and relevant international standards]

2 Each State Party agrees to permit visits, [in principle,] in accordance with this Protocol, to [any place] [places of detention] [on any territory] under its jurisdiction [and control] where persons (may, based on reliable information [as determined by a competent and independent judicial authority of the State Party concerned] be deprived or) are [deprived of their liberty] [detained] [including structures intended or used to house or transport such persons] by [or pursuant to an order of] a public authority [or at its instigation or with its consent or acquiescence]

[3. Nothing in this Protocol will be interpreted as allowing

(a) Visits to any civil or military facility that the State considers related to strategic national interest, or

(b) Interference in the domestic affairs of Member States in a manner which exceeds the provisions of the present Protocol]

Article 8

1. The Subcommittee

(a) Shall establish, on the basis of a transparent and impartial procedure, a programme of regular [missions] [visits] to all States Parties [A reasonable frequency for the [missions] [visits] shall bedecided by agreement with State[s] Party[ies],

[these regular [missions] [visits] include follow-up missions,

(b) Shall also undertake such other [missions] [visits] as appear to it to be required in the circumstances and based on reliable information, [determined as described in article 1 of the Protocol] with a view to firthering the aims of this Protocol],

2. (a) The Subcommittee shall send a written notification to the Government of the State Party concerned of its [intention] [request] to organize a [mission] [visit], [followed by] [including] a list of placesto be visited and the composition of the delegation. [The Subcommittee may also vsit other places as needed during its mission],

[(b) Those [missions] [visits] shall be conducted after the consent of the State concerned and shall be mutually agreed upon between the Subcommittee and the State Party in a spirit of cooperation],

(c) [Missions] [visits] shall be organized and carried out in accordance with the principles set out in article 5 of the Protocol.

3. [(a)] [Six months] Before a [mission] [visit] is carried out, the Subcommittee and the State Party concerned shall, [if either of them so requests,] enter into consultations with a view to agreeing [without delay on the practical arrangements] [on the modalities] of the [mission] [visit],

[(b) Such consultations on the practical arrangements for the [mission] [visit] may not include negotiations on the obligations of a State Party under article 1 of the Protocol]

Article 12

[1. The Subcommittee and the State Party shall cooperate with a view to the effective fulfilment of the [mission] [visit]. In particular, the State Party shall provide

(c) The delegation with access to, and freedom of movement within, any territory under its jurisdiction [and control] for the conduct of the [mission] [visit],

(d) The Subcommittee or its delegations with all information relevant to the effective conduct of the [mission] [visit], including in particular on any person or places referred to in article 1 of the Protocol,

(e) The delegation with access to and within any place referred to in article 1 of the Protocol,

(f) The delegation with access to persons referred to in article 1 of the Protocol, and the opportunity for private interviews with them,

(g) The Subcommittee and its delegation with the opportunity to communicate freely with any other person who is in a position to supply relevant information

[2 The obligations referred to above shall be subject to any arrangements that the State Party concerned considers necessary for

[(a) The protection of sensitive areas [equipment] or information [based on imperative grounds of national security] [or economic, technological or scientific secrets],]

[(b) The protection of any constitutional obligations the State Party concerned may have with regard to proprietary rights, searches and seizures, or other constitutional rights [of individuals],]

[(c) The physical protection and safety of persons, including the members of the Subcommittee, and]

[(d) The protection of personal data of individuals as required by national legislation [consistent with human rights principles]].

If the State Party is unable to provide full access to places, information or persons, the State Party shall make every reasonable effort to demonstrate to the Subcommittee, through alternative means, its compliance with this Protocol.]]

[Article X

The provisions of this Protocol shall be applied in accordance with domestic legislation consistent with the Charter of the United Nations and other international obligations of the State.]

Article 13

1 In exceptional circumstances, [in the context of a mission,] the competent authorities of the State Party concerned may make objections to the Subcommittee [or its delegation] against a particular visit [or a mission] Objections may only be made on [urgent and compelling] grounds of national defence, public [or individual] safety, natural disasters, serious disorder in [the place to be visited] [places where persons are detained,] [the medical condition of a person] [or that an urgent interrogation relating to a serious crime is in progress] [which temporarily prevent the carrying out of a visit The existence of a state of emergency as such should not be invoked by a State Party as a reason to object to a visit]

2 Following any such objections, the Subcommittee and the State Party shall [immediately] enter into consultations regarding those circumstances and seek agreement on arrangements to enable the Committee to exercise its functions [expeditiously] [Until the [mission or] visit takes place, the State Party shall provide information to the Subcommittee about persons or places relevant to its [mission or] visit]